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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 593

FRANCIS R. COPE, JR., PETITIONER,

vs.

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 10, 1946.

CERTIORARI GRANTED DECEMBER 9, 1946.

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RELEVANT DOCKET ENTRIES.

1937

Feb. 18. Bill of Complaint, filed.

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Feb. 19. Amended and supplemental bill filed.

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Mar. 11. Motion to dismiss bill by Girard Trust Co., Trustee et al, filed.

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Mar. 13. Appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for Mrs. E. S. Cope, filed.

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Mar. 13. Special appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for F. R. Cope, Jr., filed.

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Mar. 19. Answer of Hazel Berger & Mary E. Seaman, filed.

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Mar. 22. Motion by Fidelity-Phila. Trust Co. trustee u/w Blanche E. Neide, dec'd to dismiss bill, filed.

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Mar. 23. Answer of Robert D. Christie, Exr. etc. filed.

Mar. 24. Motion by A. Irvin Voss, et al, to dismiss bill, filed.

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April 1. Answer of Stewart Morgan, filed.

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May 18. Stipulation of counsel substituting Trustee of B. E. Neide, deceased, as party defendant, filed.

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1944

Aug. 28. Motion of Girard Trust Co., Trustee et al to dismiss bill, filed.

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Relevant Docket Entries

Aug. 28. Motion of Steere & Co. to dismiss bill, filed.

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1945

Mar. 27. Appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for Francis R. Cope, Jr., filed.

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May 8. Plaintiffs motion for summary judgment, filed.

Aug. 3. Opinion, Bard, J., dismissing action, filed.

Aug. 3. Judgment dismissing action, filed. 8-4-45 Noted & Notice mailed.

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Aug. 29. Petition of plaintiff for rehearing sur motions to dismiss, filed.

Sept. 11. Order of Court denying petition for rehearing, filed 9-12-45 noted & notice mailed.

Sept. 11. Order of Court denying motion to suspend judgment filed. 9-12-45 noted.

Oct. 30. Plaintiff's notice of appeal, filed. 10-31-45 copies to Harold Evans; John Wintersteen; Arthur Littleton; F. H. Spotts; Thomas Stokes; Chas. M. Donley; Jas. D. Harlan; Chas. H. Weidner; & Morris H. Fussell.

Oct. 30. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

Oct. 30. Appellant's designation of contents of record on appeal, filed.

Oct. 30. Appellant's statement of points on which he intends to rely, filed.

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Nov. 15. Order of Court amending opinion filed Aug. 3, 1945 filed 11-16-45 noted.

Dec. 6. Order of Court extending time for filing record on appeal to Jan. 7, 1946, filed.

COUNSEL OF RECORD.

Robert S. Marx, Esq., and Harry Kasfir, Esq., of Nichols, Wood, Marx & Ginter, Esqs. (Cincinnati, Ohio), John Garaguso, Esq., Vincent C. Veldorale, Esq., Joseph Marinelli, Esq., for A. M. Anderson, Receiver.

Arthur Littleton, Esq., for C. N. Davis, Fidelity-Philadelphia Trust (Est. C. W. Poultney); Fidelity-Philadelphia Trust Agent for Spencer and Rebecca B. W. Spencer; Fidelity-Philadelphia Trust Company, Trustee, Estate Neide, Charles N. Davis.

David J. Smyth, Esq., for Chas. Roland.

Thos. Stokes, Esq., and Frederick H. Spotts, Esq., for A. I. Voss and Lena Schmidte.

Wintersteen, McCoy & Wintersteen, Esqs., for Girard Trust Company, Trustee, et al.

MacCoy, Brittain, Evans & Lewis, Esqs., for R. S. Holland, L. B. Holland, Mrs. L. A. Holland, Girard Trust Co., Trustee C. Cope; Mrs. E. S. Cope, Francis R. Cope, Jr., and Steere & Co.

David I. Scanlon, Esq., for J. J. Tunney.

M. L. Casman, Esq., for Elsa N. B. Pridgen.

John Arthur Brown, Esq., and Jos. J. Brown, Esq., for Nellie S. Brooks.

Harold R. McCown, Esq., for C. S. McCown.

H. Lawton Russell, Esq., for H. Berger and M. E. Seaman.

Chas. H. Weidner, Esq., for Stewart Morgan.

Ballard, Spahr, Andrews & Ingersoll, Esq., for Girard Trust Company, Trustee, Estates Jane G. G. Childers and J. L. Glenn; and for Gottlieb Grauf.

BILL OF COMPLAINT.

I.

The National Bank of Kentucky is a national banking association organized under the laws of the United States, commonly known as the National Bank Act, and is domiciled at Louisville, Jefferson County, in the Western District of Kentucky.

II.

Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930.

III.

Thereafter on November 17, 1930, the Comptroller of the Currency of the United States, being satisfied from information on file in his bureau, that said National Bank of Kentucky, located in the City of Louisville, County of Jefferson and State of Kentucky, was insolvent and unable to pay its just and legal debts, and in pursuance of the power and authority vested in him by law and under the provisions of Section 1 of the Acts of Congress,—"An act authorizing the appointment of receivers for national banks and other purposes," approved June 30, 1876, appointed Paul C. Keyes Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver. Said Paul C. Keyes thereupon duly qualified and entered upon the duties of his office as such Receiver and took possession of all of the books, rec-

ords and assets of said Bank and continued in the possession and control thereof as such Receiver until December 15, 1932, on which date he resigned. Thereafter, on December 15, 1932, F. G. Awalt, then Acting Comptroller of the Currency, pursuant to the power and authority vested in him by law, as aforesaid, appointed the plaintiff, A. M. Anderson, Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver, and the said plaintiff forthwith qualified and thereupon entered upon the duties of his office as such Receiver, took possession of all of the books, records and assets of said Bank. Plaintiff still is in the possession and control thereof as such Receiver and is still the duly appointed, qualified and acting Receiver of said The National Bank of Kentucky.

IV.

This is a suit of a civil nature in equity brought by the plaintiff as receiver of an insolvent national bank in performance of his official duties. As such Receiver, he is an officer of the United States. This suit arises under the constitution and laws of the United States for the enforcement of a liability imposed by the laws of the United States. This is a case for winding up the affairs of a national banking association.

This suit is brought in equity for the reason that the plaintiff does not have an adequate remedy at law, because an accounting is necessary and prayed for herein to determine the proportionate part of the aggregate liability claimed against the defendants named herein for which each individual is severally liable and to determine the credit to which the defendants may be entitled, if any, by reason of the collections made by the plaintiff on account of the statutory liability hereinafter set forth. The matters set

forth herein involve complicated interests and degrees of interest among approximately six thousand stockholders of BancoKentucky Company in which the defendants, and all of said stockholders, have a common interest. The equitable determination in one action of the questions of common interest, will avoid a multiplicity of suits and circuity of actions and the unreasonable expense of separate suits which would dissipate the trust fund herein sought to be recovered for the benefit of creditors of said Bank, and, unless the plaintiff is granted the relief in equity as prayed for herein, he will suffer irreparable damage and injury.

On account of all of which the plaintiff has no adequate remedy at law and this court has jurisdiction of this suit.

V.

The defendants are named in the caption hereof and the names of said defendants are incorporated in the body of this complaint by reference to the caption hereof, the same as if fully set forth herein and are not repeated to prevent unduly encumbering the record.

The defendants are citizens and residents of the State of Pennsylvania.

The corporate defendants are either corporations organized and existing under the laws of the State of Pennsylvania, or are corporations organized and existing under the laws of other states which have qualified to do business in the State of Pennsylvania and are engaged in business therein.

Certain defendants are sued in a representative capacity, as fully set forth in the caption incorporated herein by reference. Certain other defendants, as indicated in Exhibit "A" by legend "Distributee of the estate of" a named person, have received assets from the estate of the named deceased persons who were during their lifetime liable as hereinafter set out, or from estates which were liable as hereinafter set out and such persons named as distributees

are liable to the extent of the assets received by them from such estates.

VI.

On or about the 20th day of February, 1931, J. W. Pole, as the Comptroller of the Currency of the United States, upon an accounting by Paul C. Keyes, as Receiver of The National Bank of Kentucky, and upon a valuation of the uncollected assets of said Bank remaining in the hands of Paul C. Keyes as Receiver, found to the satisfaction of the Comptroller of the Currency that in order to pay the debts of The National Bank of Kentucky, it was necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876 and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act, and said Comptroller of the Currency, by virtue of the authority vested in him by law, did therefore levy and make an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00 to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of The National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders.

VII.

At the time of the closing of The National Bank of Kentucky, it had issued and outstanding 40,000 shares of capital stock of the par value of $100. each, and 39,820 of said shares were held by Henry Vogt, Thomas J. Minary, Stew-

art E. Duncan, Allen P. Dodd, Charles H. Bohmer, and Ben J. Metcalfe, as Trustees under a certain trust agreement dated April 22, 1927, entered into between the owners and holders of the capital stock of The National Bank of Kentucky and the owners and holders of the capital stock of the Louisville Trust Company. At the time of the closing of The National Bank of Kentucky, in addition to the stock of The National Bank of Kentucky, the above mentioned trustees held, under the same trust agreement, 17,235 shares of the capital stock of the Louisville Trust Company.

VIII.

Pursuant to the terms of said trust agreement, the above mentioned trustees issued to each stockholder of The National Bank of Kentucky and to each stockholder of the Louisville Trust Company whose stock was deposited with said trustees, a transferable Trustees Participation Certificate having a par value of $100. in lieu of each share of stock of the bank or trust company having a par value of $100. Said Trustees Participation Certificate certified that the holder was the owner of shares of stock of the par value of $100. each, of the indivisible trust estate consisting of the shares of the capital stock of The National Bank of Kentucky and the Louisville Trust Company and of any other corporation acquired by the trustees under the agreement between the stockholders of said institutions previously described. This certificate was issued under the terms of the aforesaid agreement and the holder thereof, by accepting the same, consented to and adopted the terms of the certificate and the terms of the agreement, as if fully written in said certificate.

Subsequent to April 22, 1927, each share of the trust estate having a par value of $100. per share, was divided into ten shares of the trust estate, each having a par value of $10.00 per share, but, except for the change in par value, said Trustees Participation Certificates remained un-

changed and were issued under and subject to the trust agreement dated April 22, 1927.

Each Trustees Participation Certificate having a par value of $10.00 represented .0697923 of a share of the capital stock of the National Bank of Kentucky, having a par value of $100. per share.

IX.

Each and every Trustees Participation Certificate contained on the face thereof a statement that it was issued pursuant to the trust agreement of April 22, 1927, which was recited to be on file with said National Bank of Kentucky and each and every Trustees Participation Certificate contained on its face the further agreement assented to by the holder thereof and reading as follows:

> "This certificate is issued under the terms of the aforesaid agreement and the holder hereof by accepting same, consents to and adopts said terms as if fully written herein."

One of the terms of said trust agreement of April 22, 1927, to which the above assent was given by the holders of Trustees Participation Certificates, read as follows:

> "(1) The Trustees shall not be responsible for any acts done by them as Trustees in good faith and in the exercise of an honest judgment. No Trustee shall be liable for the act or omission of another Trustee.
>
> "(2) They shall not be liable, except as Trustees to the extent of the Trust funds held by them by reason of the ownership of stock in any corporation. They shall be indemnified against any such liability by each holder of Trustees' Participation certificates to the extent hereinafter set forth.
>
> "(3) Each owner of a Trustees' Participation Certificate issued hereunder shall be subject to the same liability thereon as he would have been subject to in

case he had been the owner of record of such proportionate part of the shares held by the Trustees in any corporation as the number of shares called for by his Trustees' Participation Certificate bears to the whole number of shares covered by all outstanding Trustees' Participation Certificates; and to such extent he shall indemnify and hold harmless the Trustees owning such stock from any loss or liability on account of being the holders or owners thereof. The measure of liability assumed hereunder shall be the same as that provided by law with reference to the holders of stock in any particular corporation in which the Trustees may hold stock as is provided by law with reference to the holders of such stock, and no more."

X.

At the time of the closing of the National Bank of Kentucky as aforesaid, there were issued and outstanding 570,550 shares of the trust estate having a par value of $10.00 per share, and said shares represented 39,820 shares of the capital stock of the National Bank of Kentucky having a par value of $100. per share.

XI.

On or about July 19, 1929, the officers and directors of the National Bank of Kentucky and the officers and directors of the Louisville Trust Company and the Trustees under the trust agreement of April 22, 1927, proposed to the holders of said Trustees Participation shares of the National Bank of Kentucky and the Louisville Trust Company, that the two banks and the business conducted by them should be reorganized by adding to this group a third corporation which said officers, directors and trustees represented would make the operations of these banking institutions more profitable, and expand their facilities for the

profit of the shareholders of said banks. The plan of reorganization proposed by the officers and directors of the two banks and approved by formal resolutions of the trustees under the trust agreement of April 22, 1927, was to organize under the laws of the State of Delaware, a holding corporation to be known as the BancoKentucky Company, with an authorized capital of 2,000,000 shares having a par value of $10. each and to exchange the stock of this holding corporation for stock of the bank, represented by the Trustees Participation Certificates on the basis of two shares of the stock of said holding corporation, the BancoKentucky Company, for each Participation share.

The Trustees Participation shareholders were advised that it was an essential part of the plan that the shares of this holding corporation, the BancoKentucky Company (or at least a substantial majority thereof) be owned by the Trustees Participation shareholders and that it be managed and operated by the boards of directors and officers of the two banks. The holders of 570,550 shares of the trust estate approved and adopted the plan above described and the holders of 340,384 shares of the trust estate representing 37714.6422 shares of stock of the National Bank of Kentucky exchanged their Trustees Participation Certificates which represented the stock of National Bank of Kentucky and the Louisville Trust Company, for 1,080,768 shares of the holding company, BancoKentucky, which shares continued thereafter to represent the holders' interest in said bank stock.

XII.

Pursuant to the above described plan, the holders of the Trustees Participation shares representing approximately 95% of the stock of the National Bank of Kentucky and the Louisville Trust Company, caused said holding corporation to be organized as their agency and instrumentality, for their own use and enrichment and in furtherance of a

scheme to engage in unlawful acts and to enable them through said corporate agency and instrumentality unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and other states relating to the ownership, operation and supervision of banks and trust companies.

Accordingly said holding corporation, the BancoKentucky Company was incorporated under the laws of the State of Delaware on July 16, 1929, with an authorized capital of 2,000,000 shares of common stock of the par value of $10. each for the alleged purposes set forth in its articles of incorporation as follows:

> "The acquiring by purchase or otherwise of all or any portion of the capital stock, property, assets and franchises of any or all corporations transacting business in any state of the United States; the purchasing, holding, selling, assigning, transferring, mortgaging, pledging or otherwise disposing of shares of the capital stock of or any bonds, securities or evidence of indebtedness created by or issued by any other corporation or corporations organized under the laws of any State of the United States or of any foreign country and while the owner thereof to exercise all the rights, powers and privileges of ownership the purchasing or otherwise acquiring of any promissory notes or other evidences of indebtedness executed by any person, firm, association or corporation; the financing, managing or operating of any commercial or manufacturing business or enterprise; the underwriting of any issue of stocks, bonds, debentures or other securities issued by any corporation; the charging of fees or commissions for any or all services rendered or advice or assistance given to any person, firm, association or corporation; acquiring and paying for in cash, stock or bonds, of this corporation or otherwise, the good will, rights,

assets and property of any person, firm, association or corporation and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, or corporation.

"The corporation shall have power to act as registrar or transfer agent for any other association or corporation and to act as agent in general for any other person, firm, association or corporation.

"The corporation shall have full power to issue bonds, debentures or obligations of this corporation from time to time, for any of the objects or purposes of the corporation and to secure the same by mortgage, pledge, deed of trust or otherwise. The corporation shall have full power to purchase, hold, sell and transfer the shares of its own capital stock, provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital; and provided, further, that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

"The corporation shall have full power to guarantee the obligations of any other person, firm, association or corporation and to become surety therefor and to become joint maker, endorser or acceptor of any such obligations and to charge fees and commissions for such service.

"The corporation shall have full power without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the States of the United States, or any foreign country, subject to the laws of such States or foreign countries.

"In general, the corporation shall have full power to carry on any other business in connection with the foregoing whether commercial, manufacturing, financial or otherwise, and to have and exercise all the

powers conferred by the laws of Delaware upon corporations formed under the act hereinafter referred to and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

"The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to that limit or restrict in any manner the powers of this corporation."

XIII.

The defendants and other shareholders of said banks in carrying out the plan and scheme aforesaid through the agency and instrumentality of their holding corporation, the BancoKentucky Company, proceeded unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and of other states relating to the ownership, operation and supervision of banks and trust companies and unlawfully to use the assets of said banks and trust companies in speculative financial transactions prohibited by law, and unlawfully to use the assets and property of one or more of said banks in making loans on the security of the holding company stock in violation of law.

XIV.

After the aforesaid exchange of Trustees Participation Certificates for stock of the holding corporation, the Banco-Kentucky Company, the holders of the stock of the Banco-Kentucky Company continued to be the actual, real and beneficial holders of approximately 95% of the stock of the National Bank of Kentucky and continued after the organization of the holding company, to receive all of the benefits

and advantages incident to the ownership of stock in said National Bank.

XV.

At the time of the organization of the BancoKentucky Company and at all times thereafter, the persons who appeared as stockholders of the said company exercised all the rights and privileges of shareholders of the National Bank of Kentucky and of the other banks and trust companies whose capital stock was held by BancoKentucky. Said persons who appeared as stockholders of BancoKentucky secured and retained to their own use and enrichment all the benefits and advantages of shareholders of the National Bank of Kentucky and were from the time of the organization of the BancoKentucky Company up to the time of the closing of the National Bank of Kentucky the real, actual and beneficial owners of the Trustees Participation Certificates which represented shares of stock of the National Bank of Kentucky.

From the time of its organization to the date of the closing of the National Bank of Kentucky, the BancoKentucky Company acted as a corporate agency and instrumentality for the persons whose names appeared as stockholders of said company and as such corporate agency and instrumentality for said owners of the said BancoKentucky Company stock it held the Trustees Participation Certificates which represented the shares of stock in the National Bank of Kentucky and the persons whose names appeared as stockholders of the BancoKentucky Company were the actual, real and beneficial owners of the stock of the National Bank of Kentucky.

XVI.

The holders of the Trustees Participation Certificates who organized the BancoKentucky Company as a holding

corporation for their bank stock, well knowing that said bank stock was subject to the individual liability of shareholders of National Banks, imposed by the Acts of Congress, Sections 5151 and 5234 of the Revised Statutes of the United States and knowing that bank stock of state banking institutions was subject to individual liability imposed by state laws, nevertheless, in the organization of the said Banco-Kentucky Company, intentionally undertook to evade the provisions of said sections of the Acts of Congress by deliberately omitting from the Articles of Incorporation any provision for the payment of the liability upon national and state bank stocks provided by the laws of the United States, the Commonwealth of Kentucky and other states, and deliberately and intentionally sought to evade said liability by including in the Articles of Incorporation of BancoKentucky Company the following language:

"VIII. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever,"

and by printing in its certificates of stock the words "full paid and non-assessable," and in so attempting to evade such assessment liability perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for whose benefit this action is brought.

XVII.

By reason of all of the foregoing, the defendants are not entitled in equity and good conscience to the immunity recognized by law which stockholders of a bona fide lawfully formed and conducted corporation ordinarily have and defendants are not entitled in equity and good conscience to shield themselves from the assessment imposed upon them by law with said corporate form the BancoKentucky Company. By reason of the foregoing, the defendants are the real, true and beneficial shareholders of the National Bank of Kentucky and have promised to pay said assessment and

are estopped to deny said assessment liability, and are the owners of shares of stock of the National Bank of Kentucky and each of the defendants appearing to be stockholders of the BancoKentucky Company is liable for the payment of the assessment levied by the Comptroller of the Currency hereinbefore referred to, individually, ratably and proportionately to the extent that the number of shares of stock held by him bears to the total number of shares issued and outstanding.

XVIII.

Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931.

"As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the Office of the Receiver on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as

Receiver of the National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of the National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

Paul C. Keyes
RECEIVER OF THE NATIONAL
BANK OF KENTUCKY
Louisville, Kentucky

Registered Letter
Return Receipt Requested."

Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described.

XIX.

Thereafter, the Receiver of the National Bank of Kentucky secured leave of the Jefferson County Circuit Court, which had previously appointed a receiver for the BancoKentucky Company, to file an action against the receiver of the BancoKentucky Company to collect said assessment and leave having been secured, the receiver, on October 31, 1931, filed an action in this court against Joseph S. Laurent, Receiver of the BancoKentucky Company, praying for judgment by reason of the assessment in the amount of $3,772,162.40. Said cause being docketed in the United States District Court for the Western District of Kentucky as No. 1383. Thereafter, the cause was heard and on September 14, 1932, the Receiver of the National Bank of Kentucky recovered judgment for the full amount of the assessment, plus interest at the rate of six per cent (6%) per annum.

Said judgment was entered September 14, 1932. Said judgment has been affirmed by the United States Circuit Court of Appeals and said judgment has become final and except for a credit of $90,745.17, hereafter described, is wholly unpaid and unsatisfied.

XX.

On December 18th, 1934, the Receiver of the BancoKentucky Company paid to the plaintiff, as Receiver of the National Bank of Kentucky, the sum of $90,745.17, said payment being made to plaintiff as a creditor of BancoKentucky Company by reason of the judgment mentioned above and said payment is the only money paid to the plaintiff on account of the judgment for stock assessment up to the present time. The plaintiff says that there are other moneys which he may collect from the Receiver of the BancoKentucky company, before the assets in the hands of said Receiver are completely exhausted, but plaintiff says that there are numerous controversies with respect to the distribution of the assets of the BancoKentucky Company and says that for this reason he is unable to state at the present time what if any further sum may eventually be paid by the Receiver of the BancoKentucky Company on account of said judgment, but plaintiff alleges that BancoKentucky Company is hopelessly insolvent and any payment that might be made will be relatively small and that said judgment will remain substantially unsatisfied.

XXI.

Plaintiff says that the depositors and creditors of the National Bank of Kentucky have only been paid up to the present time, sixty-seven (67%) per cent of the face amount of their deposits and claims.

XXII.

Plaintiff further says that there is due him as Receiver of the National Bank of Kentucky by reason of the stock assessment on the 37,714.6422 shares of National Bank of Kentucky stock held by the BancoKentucky Company as the agency and instrumentality of the defendants and other shareholders of said company, and in accordance with their plan adopted as aforesaid, the sum of $3,771,464.22, less $90,745.17 paid on December 18th, 1934.

XXIII.

On January 14th, 1930, the Articles of the BancoKentucky Company were amended and the authorized capital stock in said company was increased from 2,000,000 to 5,000,000 shares, each share having a par value of $10.00. At the time of the closing of the National Bank of Kentucky, there was issued and outstanding 2,072,468 shares of the capital stock of the BancoKentucky Company.

XXIV.

Each of the defendants and each stockholder of the BancoKentucky Company not named a defendant herein is individually liable to pay said assessment in the proportion that his shares of stock of the BancoKentucky Company bears to the total number of shares of the BancoKentucky Company issued and outstanding at the date of the closing of the National Bank of Kentucky. The plaintiff is informed and believes that the sum due from each stockholder of BancoKentucky Company, including interest to the date of the filing of this petition, amounts to approximately $2.304909 for each share of stock of the BancoKentucky Company registered in his name or owned by him at the time of the closing of the National Bank of Kentucky.

XXV.

The several defendants named herein are holders or are personal representatives or distributees of estates of holders of BancoKentucky Company stock in the amounts set out opposite their respective names on the schedule and list hereto attached, made a part hereof, and marked "Exhibit A," and are each indebted to the plaintiff as Receiver of the National Bank of Kentucky in the estimated amounts set opposite their respective names on said Exhibit A, in the column thereof designated "Amount of Assessment," together with interest at the rate of six per cent (6%) per annum.

XXVI.

Plaintiff, therefore, prays:

1. That a subpoena be issued according to the course and practice of this court, requiring the defendants to appear and answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived according to the rules and practice of this court.

2. That an accounting be made and stated to determine the number of shares of the stock of BancoKentucky Company that were issued and outstanding at the date of the failure of the National Bank of Kentucky; to determine the number of shares of the capital stock of the National Bank of Kentucky that were represented by the Trustees Participation Certificates held by the BancoKentucky Company as the agency and instrumentality of the defendants and the other stockholders of the BancoKentucky Company; to determine the proportionate part of a share of stock of the National Bank of Kentucky which was represented by a share of stock in BancoKentucky Company; to determine

the proportionate amount of the assessment for which each holder of the stock of the BancoKentucky Company is liable giving due and proper credit to said defendants and the other stockholders of BancoKentucky Company for such part of the assessment that the Receiver has collected, or may hereafter collect, and for which said defendants and other shareholders are entitled to credit.

3. That the court fix and determine the number of shares of National Bank of Kentucky stock of which the several defendants, or their decedents or transferors, were the real and beneficial owners, and the assessment liability thereon, and that upon such accounting, the plaintiff be awarded a judgment and decree against the several defendants for the amount, by said accounting found to be due from each of them.

4. That plaintiff may have such further, other and different relief in the premises to which he may be entitled, and as shall be agreeable to equity and good conscience.

THOMAS A. LOGUE,
Solicitors for Plaintiff

State of Kentucky)
County of Jefferson)

On this 6th day of February, 1937, before me, a Notary Public, in and for said County, personally appeared A. M. Anderson to me personally known, who being duly sworn did say that he is the Receiver of the National Bank of Kentucky, an insolvent national banking association; that he has read the foregoing Bill of Complaint and that he

executed the same and that the allegations contained therein are true as he verily believes.

A. M. ANDERSON,
Receiver of the National Bank of Kentucky.

Subscribed and sworn to before me by A. M. Anderson, Receiver of the National Bank of Kentucky, this 6th day of February, 1937.

My commission expires on the 6th day of June, 1937.

KARL C. CASSADY,
(Seal) Notary Public, Jefferson County, Kentucky.

EXHIBIT "A".

Number of Item	Name	Number of Shares	Amount of Assessment
1	Andrews, Mrs. Julia Dupont	80	$ 184.39
2	Berger, Mrs. Hazel	120	276.58
3	Bradford, Katherine N.	60	138.29
4	Bradford, William	20	46.09
5	Brooks, Mrs. Nellie Sanders	150	345.73
6	Childers, James Glen	30	69.14
7	Cope, Mrs. Elisabeth S.	1400	3,226.87
8	Cope, Francis R. Jr.	2560	5,900.56
9	Fidelity-Philadelphia Trust Company, Substitute Trustee for Charles N. Davis under the will of Charles W. Poultney, deceased,	256	590.05
10	Davis, Charles N.	256	590.05

Bill of Complaint—Exhibit "A,"
List of Defendants

11	Girard Trust Company, Trustee u/d Jane Gray Glen Childers	700	1,613.43
12	Childers, Jane Gray Glen	700	1,613.43
13	Girard Trust Company, Trustee, Clementine Cope and Annette Cope Memorial Fund	540	1,244.65
14	Girard Trust Company, Trustee u/d James Lyle Glenn	240	553.17
15	Glenn, James Lyle	240	553.17
16	Grauf, Gottlieb	324	746.79
17	Gunster, Joseph F.	400	921.96
18	Harlan, James D.	90	207.44
19	Heyer, Catherine B.	70	161.34
20	Heyer, Harriet, Executrix of the Estate of Edward G. Heyer, deceased	100	230.49
21	Heyer, Harriet, Distributee of the Estate of Edward G. Heyer, deceased	100	230.49
22	Heyer, Mrs. Harriet	100	230.49
23	Hillenmeyer, Miss Grace A.	260	599.27
24	Holland, Leicester B.	160	368.78
25	Holland, Mrs. Louise Adams	100	230.49
26	Holland, Rupert S.	160	368.78
27	Linville, Newton	40	92.19
28	Loving, R. Courtenay	260	599.27
29	McCowan, Carolina S.	32	73.75
30	Morgan, Stewart	50	115.24
31	Neide, Miss Blanche E.	200	460.98
32	Pilson, Jesse	10	23.04
33	Pridgen, Mrs. Elsa Neide Brooke	110	253.53
34	Putnam, Mrs. Lucy S.	146	336.51

35	Roland, Charles	360	829.76
36	Rolph, Elizabeth C.	480	1,106.35
37	Seaman, Mrs. Mary E.	184	424.10
38	Fidelity-Philadelphia Trust Company, Agent for Mrs. Rebecca B. Willing Spencer	520	1,198.55
39	Spencer, Mrs. Rebecca B. Willing	520	1,198.55
40	Tunney, Joseph J.	65	149.81
41	Christie, Robert D., Executor of the Estate of Pauline W. Christie, deceased	120	$276.58
42	Christie, Robert D. Distributee of the Estate of Pauline W. Christie, deceased	120	$276.58
43	Weyer, Mary Christie, Distributee of the Estate of Pauline W. Christie, deceased	120	$276.58
44	Christie, John W., Distributee of the Estate of Pauline W. Christie, deceased	120	$276.58
45	Steere & Company	1,960	4,517.62

AMENDED AND SUPPLEMENTAL PETITION [COMPLAINT].

Now comes A. M. Anderson, Receiver of the National Bank of Kentucky, and amends and supplements his petition filed in this cause for the purpose of adding several defendants in the same position as the defendants previously mentioned and listed in the previous action.

Your Receiver hereby adopts the allegations contained in this petition and reavers the same as though said allegations were set out herein in full.

Your Receiver further states that at the time of the closing of the National Bank of Kentucky, Martha R. Blessing was the owner and holder of 400 shares of BancoKentucky Company stock and that by reason of the allegations of the petition, which allegations are adopted and re-averred here by reference thereto, there is due the Receiver of the National Bank of Kentucky from said Martha R. Blessing by way of stock assessment the sum of Nine Hundred Twenty-one and 26/100 ($921.26) Dollars.

Your Receiver further states that at the time of the closing of the National Bank of Kentucky Gault & Company was listed on the records of the National Bank of Kentucky as the owner of 500 shares of BancoKentucky Company stock.

Your Receiver further states that A. Irvin Voss, William W. Haig and Lena Schmidte conducted a business and operated under the fictitious name of Gault & Company and registered for the purpose of conducting such business with the Department of State of the Commonwealth of Pennsylvania on April 13, 1931. Thereafter, on October 13, 1931 said registration was cancelled.

Your Receiver states that by reason thereof said A. Irvin Voss, William W. Haig and Lena Schmidte became the owners of 500 shares of BancoKentucky Company stock, above referred to, and subject to assessment in the sum of Eleven Hundred Fifty-two and 45/100 ($1152.45) Dollars.

Wherefore, plaintiff prays as in his original petition and that a subpoena issue directed to said additional defendants.

THOMAS A. LOGUE,
Solicitor for Plaintiff.

Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint

State of Kentucky,
Commonwealth of Jefferson, } ss:

On this 15th day of February, 1937, before me a Notary Public in and for said county, personally appeared A. M. Anderson, to me personally known, who being duly sworn, did say that he is Receiver of the National Bank of Kentucky, an insolvent national banking association; that he has read the foregoing bill of complaint and that the allegations contained therein are true as he verily believes.

A. M. ANDERSON.

Sworn to before me and subscribed in my presence this 15th day of February, 1937.

C. B. RECKTENWALD,
Notary Public, Jefferson County, Kentucky.

My commission expires on the 15th day of October, 1940.

MOTION OF GIRARD TRUST COMPANY, TRUSTEE, TO DISMISS BILL OF COMPLAINT.

(Filed March 11, 1937.)

AND NOW, March 11, 1937, come GIRARD TRUST COMPANY, Trustee under Deed of Jane Gray Glenn Childers, GIRARD TRUST COMPANY, Trustee under Deed of James Lyle Glenn, GOTTLIEB GRAUF, and JONATHAN M. STEERE, GILBERT L. BISHOP, JR., E. B.

Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint

MORRIS, JR., GEORGE H. STUART, III, and THOMAS S. HOPKINS, partners, trading and doing business under the firm name and style of STEERE & COMPANY, parties defendant in the above entitled cause, by their attorneys, Wintersteen, McCoy & Wintersteen, and, not confessing nor acknowledging any of the allegations or averments therein set forth, move to dismiss the Bill of Complaint filed in the above proceedings, for the following reasons:

1. Nonjoinder of the Receiver of the BancoKentucky Company.

The Bill, on its face, shows that the said Receiver is a necessary party to this suit.

2. Nonjoinder of all other stockholders of The Banco Kentucky Company.

The Bill, on its face, shows that all the stockholders of the said Company are necessary parties to this suit.

3. The facts alleged are insufficient to constitute a valid cause of action in equity.

4. The allegations of the Bill are insufficient to establish, *prima facie*, that the individual defendants are liable, as stockholders of the National Bank of Kentucky, for payment of the assessment levied upon the stock of the said Bank by the Comptroller of the Currency.

The Bill merely states the legal conclusion that the defendants are the beneficial shareholders of the said bank stock.

5. Laches.

The Bill was not filed within a reasonable time after the alleged cause of action arose.

Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint

6. The plaintiff has a full, adequate and complete remedy at law.

WINTERSTEEN, McCOY & WINTERSTEEN,
By JOHN WINTERSTEEN,
Attorneys for Girard Trust Company, Trustee under Deed of Jane Gray Glenn Childers, Girard Trust Company, Trustee under Deed of James Lyle Glenn, Gottlieb Grauf, and Jonathan M. Steere, Gilbert L. Bishop, Jr., E. B. Morris, Jr., George H. Stuart, III, and Thomas S. Hopkins, partners, trading and doing business under the firm name and style of Steere & Company.

United States of America
Eastern District of Pennsylvania } ss.

JOHN WINTERSTEEN, being duly sworn according to law, deposes and says that, in his opinion, the foregoing Motion to Dismiss is well founded in law and in fact, and that the said Motion to Dismiss is not interposed for delay.

(signed) JOHN WINTERSTEEN.

Sworn to and subscribed before me this 11th day of March, 1937.

(signed) HELEN L. LOBULL,
Notary Public.

(Seal)

My commission expires: Jan. 6, 1939.

ADDITIONAL MOTIONS TO DISMISS COMPLAINT IN 1937.

NOTE:

The motions of the following to dismiss the complaint have been omitted.

Mrs. Elizabeth S. Cope, Girard Trust Company, Trustee, Clementine Cope and Annette Cope Memorial Fund, Leicester B. Holland, Mrs. Louise Adams Holland and Rupert S. Holland, filed March 13, 1937.

Francis R. Cope, Jr., filed March 13, 1937.

Fidelity-Philadelphia Trust Company, Trustee under the Will of Blanche E. Neide, Deceased, filed March 22, 1937.

A. Irvin Voss and Lena Schmidte, filed March 24, 1937.

ANSWER OF HAZEL BERGER AND MARY E. SEAMAN.

(Filed March 19, 1937.)

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The answer of Hazel Berger and Mary E. Seaman to the Bill of Complaint filed in the above entitled proceedings respectfully showeth:

I. Admitted.

II. Admitted.

III. Admitted.

IV. Admitted except as hereinafter qualified.

V. Admitted.

VI. The defendants in answer to the 6th paragraph, deny that they own or ever owned stock in the National Bank of Kentucky and therefore deny liability herein.

VII. Defendants aver that the allegations in the 7th paragraph of plaintiff's Bill are not material to them for the reason that they never owned any stock in the National Bank of Kentucky or the Louisville Trust Company.

VIII. In answer to the 8th paragraph of plaintiff's Bill, defendants aver that they never did own any stock in the National Bank of Kentucky or the Louisville Trust Company.

IX. In answer to the 9th paragraph of plaintiff's Bill, defendants aver that the averments contained therein are not material since defendants had no stock in the banks therein mentioned.

X. The defendants not owning any stock in the Bank of Kentucky aver that the allegations therein are immaterial as to them.

XI. The defendants, not owning any stock in the Bank of Kentucky, aver that the allegations therein are immaterial as to them.

XII. The defendants, not owning any stock in the Bank of Kentucky and Louisville Trust Company, deny the averments in paragraph 12 of plaintiff's Bill.

XIII. The defendants deny the averments of paragraph 13 of plaintiff's Bill. Defendants are advised and therefore aver that a corporation can lawfully acquire, own, hold and control stock in a national bank or a number of national banks. Defendants aver that the allegations of paragraph 13 are improperly made in that said allegations set forth conclusions of law.

XIV. The defendants, in answer to the 14th paragraph of plaintiff's Bill, aver that they never owned any stock in the National Bank of Kentucky.

XV. The defendants deny that the Banco Kentucky Company acted as a corporate agency and instrumentality for them for the reason that they never owned any stock in the National Bank of Kentucky.

XVI. In answer to the 16th paragraph, defendants deny that they perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for the reason that they never owned any stock in said bank.

XVII. In answer to the 17th paragraph of plaintiff's Bill, defendants, not having owned any stock in the National Bank of Kentucky, and not having traded or exchanged any stock of the National Bank of Kentucky for Banco Kentucky Company stock, aver that they have no liability in equity and good conscience for the payment of the assessment levied by the Comptroller of Currency upon the shareholders of the National Bank of Kentucky.

XVIII. Defendants deny that they received the letter set forth in paragraph 18 of plaintiff's Bill.

XIX. Defendants admit the averments of paragraph 19 of plaintiff's Bill.

XX. Defendants admit the averments of paragraph 20 of plaintiff's Bill.

XXI. Defendants admit the averments of paragraph 21 of plaintiff's Bill.

XXII. Defendants deny that they are affected by the assessment set forth in paragraph 22 for reasons hereinafter set forth.

XXIII. Defendants admit the averments of paragraph 23 of plaintiff's Bill.

XXIV. Each of the defendants herein denies that she is individually liable to pay an assessment on shares of stock owned by her in the Banco Kentucky for the reason that defendants never owned any shares of stock in the National Bank of Kentucky or the Louisville Trust Company and the Banco Kentucky did not hold National Bank stock of Kentucky or Louisville Trust Company stock as their assignee, agent or in any other capacity whatsoever.

XXV. The defendants herein deny that they are indebted to the receiver of the National Bank of Kentucky as averred in paragraph 25 of plaintiff's Bill for reasons given in paragraph 24th above.

WHEREFORE defendants, Hazel Berger and Mary E. Seaman, pray your Honorable Court to dismiss the Bill of claimant as to them for the reason that the defendants, Hazel Berger and Mary E. Seaman, were not the real or beneficial owners of any shares of stock at any time in the National Bank of Kentucky or the Louisville Trust Company.

Answer of Stewart Morgan, One of the Defendants Named

AND they will ever pray, etc.

HAZEL BERGER,
MARY E. SEAMAN,
Defendants.

CHARLES M. DONLEY,
Solictor for Defendants,
1403 Law & Finance Building,
Pittsburgh, Pennsylvania.

ANSWER OF STEWART MORGAN, ONE OF THE DEFENDANTS NAMED.

(Filed April 1, 1937.)

Stewart Morgan, one of the defendants named in the above entitled cause, in answer to the Bill in Equity filed therein, avers that he has full, just and true defense to the averments therein contained of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. Defendant avers that the plaintiff has an adequate remedy at law against the registered holders of the stock of The National Bank of Kentucky, or against any alleged real owners of said stock.

5. The defendant avers that he has no knowledge of the averments contained in this paragraph of the Plaintiff's Bill in Equity, and that the means of proof thereof are solely within the knowledge and control of the plaintiff and the defendant demands proof thereof.

Answer of Stewart Morgan, One of the Defendants Named

6. The defendant avers that he has no knowledge of the averments contained in this paragraph of the Plaintiff's Bill in Equity, and that the means of proof thereof are solely within the knowledge and control of the plaintiff and the defendant demands proof thereof.

7. The defendant avers that he has no sufficient knowledge either to admit or deny the averments contained in this paragraph of the Plaintiff's Bill and further avers that the means of proof of said allegations are solely within the knowledge and control of the plaintiff, and defendant demands proof thereof.

8. The defendant avers that he owned a participation certificate in 1927 and that in 1929 he relinquished all right, title or interest in said certificate and is no longer the owner thereof. The defendant does not remember what provisions were contained on the face of said certificate and has been unable to obtain any information with reference thereto: accordingly, the defendant denies the averments of this paragraph of the Plaintiff's Bill and demands proof thereof.

9. The defendant has no knowledge of the averments contained in this paragraph and the means of proof thereof are within the control of the plaintiff; the defendant denies the same and demands proof thereof.

10. The defendant has no knowledge of the averments contained in this paragraph and the means of proof thereof are within the control of the plaintiff; the defendant denies the same and demands proof thereof.

11. The defendant avers that he exchanged his participation certificate for stock in the Banco Kentucky Company, but denies that he was a party to any illegal plan or scheme,

and further denies that he approved or consented to, or was a party to, any illegal plan or scheme involving the creation of the Banco Kentucky Company or any of the objects or purposes for which it was formed.

12. The defendant denies that he caused or assisted in causing the organization of the Banco Kentucky Company, for unlawful purposes or otherwise, and avers that he had no part in the organization of said Company and had no interest in said Company until after it was organized: further, that when he purchased stock in said holding company, he believed it to be legally organized and authorized to do business in the State of Kentucky under the provisions of its charter and the laws of the State of Kentucky and the United States; that he had, and now has, no knowledge of the provisions of the Charter of said corporation and that if the same are in any way illegal, he is without knowledge of such illegality; further that if any of the acts of said corporation or of the directors or officers of said corporation were, or are illegal or fraudulent, he was and is without knowledge thereof and is not, in any way, responsible therefor.

13. The defendant denies that he was a party to any plan or scheme as alleged in Plaintiff's Bill; defendant avers that he does not know how the Banco Kentucky Company was managed and that he was never a director of said corporation and never attended a meeting of the stockholders of said corporation; further, that if said corporation or the directors or officers or the stockholders thereof ever did any illegal act or thing, it was without the knowledge or consent of this defendant.

14. The defendant denies that by reason of his ownership of stock in the Banco Kentucky Company he was ever

the holder or real owner of any stock in the National Bank of Kentucky.

15. The defendant denies that he, as a stockholder of the Banco Kentucky Company, exercised all the rights and privileges of the shareholders of the National Bank of Kentucky and of the other Banks and Trust Companies whose capital stock was held by the Banco Kentucky Company.

The *defendant denies* that Banco Kentucky Company acted as a corporate agency and instrumentality of the defendant, and further denies that he was, or now is, the real and beneficial owner of any stock of the National Bank of Kentucky.

16. The defendant denies that he, either alone or in concert with other persons, undertook to evade the provisions of said sections of the Acts of Congress, with reference to the liability, or payment of the liability, imposed upon holders of stock in national or state banks. The defendant again avers that he had nothing to do with the incorporation or the formulating of the articles of the corporation of the said Banco Kentucky Company.

17. The defendant denies that he is the real, true and beneficial owner of any shares of stock of the National Bank of Kentucky, and denies that he has done anything in the premises which would make him so liable.

18. Admitted.

19. The defendant has no knowledge of the truth or falsity of the allegations, but avers that he has been informed and verily believes that the action alleged to have been filed by the Receiver of the National Bank of Kentucky against the Receiver of the Banco Kentucky Company pleaded and proved that the Banco Kentucky Company was the owner

of the stock of the National Bank of Kentucky standing in its name, and not the holder thereof as agent for anyone; and this defendant further avers that he has never at any time appointed Banco Kentucky Company to act as agent for him, or, if said company has claimed to have acted as such agent, has never in any way ratified such action or such claim.

20. The defendant avers that he has no knowledge of the allegation in this paragraph of the Plaintiff's Bill, and avers that the means of proof thereof are within the control of the Plaintiff, and the defendant demands proof of said averment.

21. Admitted.

22. The defendant denies that there is anything owing by him to the plaintiff, as Receiver of the National Bank of Kentucky, by reason of said stock assessment; the defendant avers that he has never, at any time, made or ratified any agency relationship or agreement with the Banco Kentucky Company, and that his relation to said Banco Kentucky Company is only that of a mere stockholder in said Company, without knowledge of improper or illegal actions or purposes on the part of said Company or any director, officer or stockholder thereof, if any there be.

23. The defendant has no knowledge of this averment, and neither admits nor denies the same.

24. The defendant denies that he is liable to pay any assessment on any shares of stock in the National Bank of Kentucky, for the reasons hereinabove stated, and more particularly for the reason that he, at the time said assessment was made, and for a period of sixty days prior to the suspension of business of said Bank, was not, and now is

not, a registered owner, nor is he the real or actual owner, of any shares of stock in the said National Bank of Kentucky.

25. The defendant again denies that he is indebted to the plaintiff in any sum for any reason whatsoever, and that he has a full and just defense to all of plaintiff's claim, for the reasons hereinabove set forth.

WHEREFORE, the defendant prays your Honorable Court to dismiss the Plaintiff's Bill with costs.

(s) STEWART MORGAN,
One of the Defendants.

(s) CHARLES H. WEIDNER,
Attorney for Defendant, Stewart Morgan.

STIPULATION OF COUNSEL.

(Filed May 18, 1937.)

It is hereby stipulated by and between THOMAS A. LOGUE, ESQUIRE, counsel for A. M. Anderson, Receiver of the National Bank of Kentucky, the plaintiff above named, and ARTHUR LITTLETON, ESQUIRE, counsel for Blanche E. Neide, one of the defendants above named, that the Bill in Equity and the Subpoena issued thereunder shall be amended so as to eliminate therefrom Blanche E. Neide, she being deceased, and to substitute therefor the Fidelity-Philadelphia Trust Company, her duly qualified Trustee under her last Will and Testament, which was filed for probate in Philadelphia County on the 29th day of No-

vember, A. D. 1929, and the case proceed as if originally started against said person as Trustee.

THOMAS A. LOGUE,
Attorney for Plaintiff.
ARTHUR LITTLETON,
Attorney for Defendant.

MOTION OF GIRARD TRUST COMPANY, TRUSTEE, TO DISMISS BILL OF COMPLAINT.

(Filed August 28, 1944.)

AND NOW, to wit: August 28th, 1944, come GIRARD TRUST CO., Trustee, under deed of Jane Gray Glenn Childers; GIRARD TRUST CO., Trustee, under deed of James Lyle Glenn and Gotlieb Grauf, parties defendant, in the above entitled cause by their attorneys, Ballard, Spahr, Andrews and Ingersoll, and neither confessing nor acknowledging any of the allegations or averments set forth in the Bill of Complaint, move to dismiss the Bill of Complaint filed in the above proceedings, and assign in support of such motion the following reasons:

1. The facts set forth therein are insufficient to constitute a valid cause of action in equity or at law.

2. The Bill was not filed within a reasonable time after the alleged cause of action arose, and was not filed within the time prescribed by the applicable Statutes of Limitations, and in particular within the time prescribed by the Act of Commonwealth of Pennsylvania of June 26th, 1895, P. L. 375, Chapter 71 of the General Statutes of Kentucky, Art. III, Sec. 2.

Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint

3. The Complainant has a full, adequate and complete remedy at law, inasmuch as (a) the assessment of the Comptroller of the Currency was for the full par value of the stock of National Bank of Kentucky; (b) the liabilities if any, of each defendant for the said assessment is several and not joint; and (c) under the allegations of the bill no accounting is necessary.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
By JOHN WINTERSTEEN,
Attorneys for Girard Trust Co., Trustee, under Deed of Jane Gray Glenn Childers: Girard Trust Co., Trustee under deed of James Lyle Glenn and Gotlieb Grauf.

United States of America }
Eastern District of Pennsylvania } ss.

JOHN WINTERSTEEN, being duly sworn according to law, deposes and says that in his opinion the foregoing motion to dismiss is well founded in law and in fact; and that the said motion to dismiss is not interposed for delay.

(S) JOHN WINTERSTEEN.

Sworn to and subscribed before me this 28th day of August, A. D. 1944.

AGNES M. HAMILTON,
Notary Public.

My commission expires 3/5/44.

Additional Motions to Dismiss Bill of Complaint in 1944 and 1945
Motion for Summary Judgment

ADDITIONAL MOTION TO DISMISS BILL OF COMPLAINT IN 1944.

NOTE:

The motion of E. B. Morris, Jr., and T. S. Hopkins, et al., partners, trading and doing business under the firm name and style of Steere & Co., filed August 28, 1944, to dismiss the complaint has been omitted.

ADDITIONAL MOTION TO DISMISS COMPLAINT IN 1945.

Motion to dismiss of Elizabeth S. Cope, item 4 of the Receiver's designation; motion of F. R. Cope, item 5 of designation; motion of Fidelity-Philadelphia Trust Company, item 7 of designation; motion of A. Irvin Voss, item 8 of designation; motion of Julia DuPont Andrews, item 13 of designation, have been omitted from the printed record for the reason that said motions raise the same points as raised by motion of Girard Trust Company which appears page 40a of record.

MOTION FOR SUMMARY JUDGMENT.

(Filed May 8, 1945.)

AND NOW, comes A. M. Anderson, Receiver of the National Bank of Kentucky, plaintiff herein, by his counsel,

pursuant to Rule 56 (a), moves the Court for a summary judgment in his favor in this cause.

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
VINCENT C. VELDORALE,
Attorneys for A. M. Anderson, Receiver National Bank of Kentucky.

OPINION ON MOTION TO DISMISS.

(Filed August 3, 1945.)

BARD, J.

Defendants seek dismissal of the complaint under Rule 12 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, because the complaint was not filed within the time prescribed by the applicable statute of limitations. The suit was brought by the Receiver of The National Bank of Kentucky to recover an assessment made by the Comptroller of the Currency under the provisions of Section 12 of the National Bank Act[1] and Section 23 of the

The facts, insofar as they are pertinent hereto, are as follows:

The National Bank of Kentucky, domiciled at Louisville, Kentucky, a national banking association organized under the laws of the United States of America, failed November 15, 1930. On November 17, 1930 the Comptroller of the Currency of the United States appointed a receiver for the bank pursuant to the power and authority vested in him by

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[1] Rev. Stat. §5151, 12 U.S.C.A. §63.

Federal Reserve Act.[2]

[2] Act of December 23, 1913, c. 6, §23, 38 Stat. 273, 12 U.S.C.A. §64.

law. On February 20, 1931 the Comptroller of the Currency levied an assessment upon the shareholders of the bank of $4,000,000, representing the par value of the 40,000 shares of stock outstanding, payable on or before April 1, 1931 at the office of the receiver in Louisville, and directed the receiver to take all steps necessary to enforce the liability of the shareholders. Practically all of the stock was controlled by the BancoKentucky Company, a holding corporation organized under the laws of the State of Delaware under a complicated investment and reorganization plan; the details of which are not pertinent to this opinion. On March 20, 1931 the receiver notified the stockholders of the BancoKentucky Company of the assessment, of a demand for payment which had been made upon the receiver of the BancoKentucky Company, and of the receiver's intention to proceed against them to the extent of any portion of the assessment not paid by the BancoKentucky Company.

In October 1931 the receiver sued BancoKentucky Company on the assessment as holder of substantially all the bank shares and obtained a judgment which was affirmed on appeal. Laurent v. Anderson, 6th Cir., 70 F. (2d) 819. About $90,000 was paid on that judgment. In February 1936 the receiver brought an action in the United States District Court for the Western District of Kentucky against stockholders of the BancoKentucky Company who were residents of Kentucky to recover a proportionate share of the assessment from them. On review, the Supreme Court of the United States held that the BancoKentucky stockholders were liable on the assessment and remanded the cause to the District Court for appropriate action. Anderson, Receiver v. Abbott, Administratrix, 321 U. S. 349, 64 S. Ct. 531, 88 L. ed. 535, rehearing denied, 321 U. S. 804, 64 S. Ct. 845, 88 L. ed. 780.

This case, instituted February 18, 1937, is a similar suit against BancoKentucky shareholders residing in Pennsylvania. The defendants move to dismiss the complaint for

failure to bring the suit within the time prescribed by the applicable statute of limitations.

Two questions must be answered: (1) when did the cause of action arise; (2) What is the applicable statute of limitations?

Before discussing these questions specifically a few relevant principles of law should be adverted to.

The liability of a shareholder of an insolvent national bank for an assessment equal to the par value of his stock is contractual in nature. Chisholm v. Gilmer, Receiver, 299 U. S. 99, 57 S. Ct. 65, 81 L. ed. 63; Brown v. O'Keefe, Receiver, 300 U. S. 598, 57 S. Ct. 543, 81 L. ed. 827; Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163. Although the liability finds its origin in a statute, the statute is considered to impose a contractual clause in every subscription or purchase of stock. By his purchase the stockholder agrees that he shall be liable for an assessment in accordance with the terms of the statute, Platt v. Wilmot, 193 U. S. 602, 24 S. Ct. 542, 48 L. ed. 809, and assumes whatever conditions or burdens the statutes have imposed as incident to the holding of national bank shares.

Ordinarily an action to enfore contractual liability is brought on the law side of the court. However, because plaintiff here seeks an accounting and other equitable relief, this action is within the equity jurisdiction of the court, but the right which is the basis of the suit remains a legal right. Since equity merely affords plaintiff a means of enforcing his legal claim, the jurisdiction of equity is concurrent with that of law. In this situation the period within which suit may be brought is determined by the statute of limitations applicable to the legal right and not by the doctrine of laches. Russell v. Todd, 309 U. S. 280, 60 S. Ct. 527, 84 L. ed. 754; Overfield v. Pennroad Corporation, 3rd Cir., 146 F. (2d) 889.

1. *Date when the cause of action accrued and the statute of limitations began to run.* The federal statutes impose an

obligation, contingent upon an assessment by the Comptroller of the Currency, upon every holder of national bank shares to pay an amount equal to the par value of the shares. This contingent obligation becomes an absolute liability upon proclamation of the assessment. Although the order of assessment removes the contingency, it does not give rise to a clause of action. Reich v. Van Dyke, 3rd Cir., 107 F. 2d 682; Strasburger v. Schram, D. C., 93 F. (2d) 246. The receiver cannot bring an action to recover the assessment until the date when the assessment is to be paid arrives and the shareholder fails to tender payment. It is this failure to pay the assessment on the date fixed that creates the cause of action and it is on this date that the statute of limitations begins to run. Pufahl, Receiver v. Estate of Parks, 299 U. S. 217, 57 S. Ct. 151, 81 L. ed. 133; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. ed. 437; Hawkins v. Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Glenn v. Marbury, 145 U. S. 499, 12 S. Ct. 914, 36 L. ed. 790. Therefore, although the order of assessment was made February 20, 1931, plaintiff's cause of action did not accrue until April 1, 1931, the date upon which payment was due, and computation of limitation of actions must begin on that date.

2. *The applicable statute of limitations.* The law of the forum governs so far as the limitation of actions is concerned. In the absence of a federal statute limiting the time in which to bring an action to enforce the liability of national bank stockholders, the state statutes of limitations are applicable[3]. Although this right of action is based on a federal statute, it may be enforced only in conformity to the law of the forum. Rawlings, Receiver v. Ray, 312 U. S. 96, 61 S. Ct. 473, 85 L. ed. 605; Pufahl, Receiver v. Estate of Parks, supra; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. ed. 702; Reich v. Van Dyke, supra.

In Pennsylvania the statute of limitations ordinarily ap-

[3] 28 U.S.C.A. 725.

plicable to actions founded upon a contract[4] requires that a suit be brought within a period of six years. This complaint was filed February 18, 1937, within the six year period. However, defendant contends that the applicable statute of limitations is the Act of June 26, 1895, P. L. 375, §1, 12 P. S. §39, a "borrowing" statute, which reverses the general rule of conflict of laws that an action not barred by the law of the forum can be maintained though it is barred in the state where it arose. The statute reads as follows: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

Defendants urge that the cause of action arose in Kentucky and that since the Kentucky statute of limitations bars actions upon contracts not commenced within five years after the cause of action accrued[5], the five year Kentucky period is made applicable in this case by the Pennsylvania statute of 1895. The Kentucky statute applies to all actions in law or equity, The Auditor v. Hablert, 78 Ky. 577; Hargis v. Sewell's Administrator, 87 Ky. 63, and is controlling in a suit to recover the statutory assessment against national bank shareholders. Anderson v. Abbott, W. D. Ky., 23 F. Supp. 265. The ultimate issue thus becomes clearly defined. If plaintiff's cause of action arose in Kentucky, the five year Kentucky limitation, borrowed by the Pennsylvania Act of June 26, 1895, is controlling and the action must be dismissed. Mister v. Burkholder, 56 Pa. Super. 517; Bluefield S. S. Co., Ltd. v. United Fruit Co., 3rd Cir., 243 Fed. 1, writ of error dismissed, 248 U. S. 595, 39 S. Ct. 136, 63 L. ed. 438; see Mechanics Sav. Bank v.

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[4] Act of March 27, 1713, 12 P.S. §31.

[5] General Statutes Chap. 71, Art. III, Sec. 2, Kentucky Revised Statutes, Baldwin's 1943 Revision, Chap. 413, Sec. 413.120. This Kentucky statute of limitations bars actions upon contracts not in writing or actions upon liability created by statute not commenced within five years after the cause of action accrued.

Fidelity Insurance, Trust & Safe-Deposit Co., E. D. Pa., 91 Fed, 456.

A cause of action requires the existence of two basic elements—a primary right belonging to the plaintiff, and a wrong done by the defendant which is a breach of plaintiff's right resulting in damage. Shaffer's Estate, 228 Pa. 36. Where the cause of action is based upon a contract plaintiff must establish the existence of contractual rights between the parties and the defendant's performance of an act or failure to act which constitutes a breach thereof. Pond Creek Mill & Elevator Co. v. Clark, 7th Cir., 270 F. 482. The place where the breach occurs is the place where the cause of action arises. Baltimore & O. R. Co. v. Reed, 6th Cir., 223 Fed. 689. When the act or failure to act occurred which created the cause of action, the place where it occurred was the place of the breach and hence the place where the cause of action arose. The failure to act on April 1, 1931, which constituted the breach of contract and created the present cause of action, was defendants' failure to tender payment, as directed, to the receiver at his office in Louisville, Kentucky. Applying the legal principles set forth above, I must hold that the cause of action arose in the State of Kentucky, the place of performance of the contract. Auglaize Box Board Co. v. Kansas City Fiber Box Co., 6th Cir., 35 F. (2d) 822, certiorari denied, 281 U. S. 730, 50 S. Ct. 247, 74 L. ed. 1147. Plaintiff's contention that the cause of action arose in the United States and not in the State of Kentucky is based upon the fallacious assumption that the cause of action arose when the Comptroller of the Currency made the order of assessment and not upon defendants' failure to tender payment at the proper time and place.

Under the Pennsylvania Act of June 26, 1895, the law of the forum requires that plaintiff's remedial rights against defendants be controlled by the five year limitation period of Kentucky. The cause of action accrued in Kentucky on April 1, 1931 and was barred by the Kentucky five year

statute of limitations on April 1, 1936. Since this action was brought 323 days thereafter, it is barred by virtue of the Pennsylvania Act of June 26, 1895.

The complaint must be dismissed.

(s) GUY K. BARD,
Judge.

JUDGMENT.

(Filed August 3, 1945.)

BEFORE BARD, J.

And Now, to wit: August 3, 1945, in accordance with the opinion of the court granting defendant's motions to dismiss, it is ordered that the above action be and the same is hereby dismissed, with costs.

By the Court:

Attest:

GILBERT A. LUDWIG,
Deputy Clerk.

PETITION FOR REHEARING.

(Filed August 29, 1945.)

TO THE HONORABLE, THE JUDGES OF DISTRICT COURT:

The petition of A. M. Anderson, Receiver of the Bank of Kentucky, by his attorney, Joseph Marinelli, Esq., the plaintiff herein, respectfully represents:

Petition for Rehearing

1. That this proceeding was instituted in the District Court of the United States for the Eastern District of Pennsylvania by a Bill in Equity against stockholders living in the state of Pennsylvania.

2. That the defendants in the case, through their attorneys, filed motions to dismiss the Bill of Complaint. A number of reasons were assigned for dismissal of the bill, among which was the question of the statute of limitations.

3. That the motions to dismiss were argued before the Hon. Judge Bard. That at the time of the argument, the attorneys of record for the defendants, and the attorney for the plaintiff, agreed that all other reasons, with the exception of the statutes of limitations, should be abandoned.

4. That the Honorable Judge Bard, on August 3rd, 1945, filed an Opinion wherein he dismissed the complaint.

5. That the action of the court in dismissing the complaint was predicated on the fact that the court applied the Act of June 26th, 1895, P. L. 375, Sec. 1; 12th P. S. 39, a "borrowing statute", which reads as follows: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth."

6. That your petitioner is advised and believes that the question of the statute of limitations in its application to the present case was not fully presented to the court in view of the fact that your petitioner was faced with the problem of meeting the objections and reasons for dismissal of the complaint as outlined in the motions filed by about thirty defendants, and therefore, did not fully present the question of the statute of limitations with the force that the case required.

7. That it was only at the time of the argument on the motions to dismiss that the attorneys, as aforesaid, agreed to abandon all objections to the complaint and center their argument on the statute of limitations.

8. That your petitioner respectfully prays and urges that this petition for a re-hearing be granted, and that your petitioner be given leave to re-argue the case, and that this petition is well founded in law and in fact, and that the same is not presented for the purpose of delay but in good faith.

WHEREFORE upon the foregoing reasons, your petitioner respectfully prays that this petition for a re-hearing be granted so that your petitioner may submit for the consideration of your Honorable Court additional arguments regarding the applicability of the "borrowing statute of limitations" as hereinabove discussed, to the case at bar.

Respectfully submitted,

JOSEPH MARINELLI,
2440 Phila. Saving Fund Bldg.,
Philadelphia 7, Penna.,
Attorney for Petitioner.

ORDER DENYING PETITION FOR REHEARING.

Sept. 11, 1945.

The within petition is denied.

(S) GUY K. BARD,
Judge.

MOTION TO SUSPEND JUDGMENT.

(Filed Sept. 11, 1945.)

And Now, to wit: this day of August, A.D. 1945, on motion of Joseph Marinelli, Esq., attorney for the plaintiff in the above entitled case, the judgment entered in this case is hereby suspended pending a re-argument on motions to dismiss the complaint filed by the defendants, and the action of the Court to be taken following the re-argument of the issues in this case.

BY THE COURT:

ORDER DENYING MOTION TO SUSPEND JUDGMENT.

Sept. 11, 1945.
Motion Denied.
GUY K. BARD, Judge.

NOTICE OF APPEAL.

(Filed Oct. 3, 1945.)

Notice is hereby given to each of the defendants named in the above action that A. M. Anderson, Receiver of National Bank of Kentucky, an insolvent National Banking Association, hereby appeals to United States Circuit Court

of Appeals for the Third Circuit, from the judgment and order entered in this action on August 3rd, 1945, by Hon. Guy K. Bard, District Judge, dismissing the plaintiff's petition.

This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

A. M. ANDERSON,
Receiver,
National Bank of Kentucky.

STATEMENT OF POINTS RELIED ON UPON APPEAL.

(Filed Oct. 30, 1945.)

AND NOW comes, A. M. Anderson, Receiver of National Bank of Kentucky, defendant and appellant herein, and states that the points on which he intends to rely on appeal in this case are as follows:

1. The District Court erred in dismissing the petition in this case.

2. The District Court erred in holding that the action was not filed within the time prescribed by the applicable statute of limitations.

3. The District Court erred in holding that the cause of action arose in Kentucky.

ROBERT S. MARX,
HARRY KASFIR,
VINCENT C. VELDORALE,
JOHN GARAGUSO,
JOSEPH MARINELLI,
Counsel for Receiver,
National Bank of Kentucky.

RECEIVER'S DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON HIS APPEAL.

(Filed Oct. 30, 1945.)

The plaintiff, A. M. Anderson, Receiver of the National Bank of Kentucky designates the following portions of the record and proceedings to be contained in the record on appeal in this action.

1. Bill of complaint filed February 18, 1937.
2. Amended and supplemental bill filed February 19, 1937.
3. Motion of Girard Trust Company, Trustee under deed of Jane Gray Glenn Childers, et al to dismiss bill of complaint filed March 11, 1937.
4. Motion of Mrs. Elizabeth S. Cope, et al, to dismiss bill of complaint filed March 13, 1937.
5. Motion of F. R. Cope, Jr., to dismiss bill of complaint filed March 13, 1937.
6. Answer of Hazel Berger and Mary E. Seaman filed March 19, 1937.
7. Motion by Fidelity-Philadelphia Trust Company Trustee under the will of Blanche E. Neide, deceased, to dismiss bill of complaint filed March 22, 1937.
8. Motion by A. Irvin Voss, et al, to dismiss bill of complaint filed March 24, 1937.
9. Answer of Stewart Morgan filed April 1, 1937.
10. Stipulation of counsel substituting Fidelity-Philadelphia Trust Company, Trustee under the will of Blanche E. Neide, filed May 18, 1937.
11. Motion to dismiss filed by E. B. Morris, Jr., et

al, doing business under the name of Steere & Co., filed August 28, 1944.

12. Motion of Girard Trust Company, trustee under deed of Jane Childers filed Aug. 28, 1944.

13. Motion of Julia DuPont Andrews to dismiss bill of complaint filed March 6, 1945.

14. Motion of Francis R. Cope, Jr., to dismiss filed March 27, 1945.

15. Motion of plaintiff for summary judgment filed May 8, 1945.

16. Opinion by Judge Guy K. Bard filed August 3, 1945.

17. Judgment dismissing action filed August 3, 1945.

18. Petition for rehearing filed August 29, 1945, together with Court's notation denying that petition filed September 11, 1945.

19. Motion to suspend judgment together with tendered order relative to same with Court's notation denying said motion filed September 11, 1945.

20. Plaintiff's notice of appeal.

21. Plaintiff's statement of points which he will rely upon on appeal.

22. This designation of record on appeal.

23. Clerk's certificate to transcript of record on appeal.

ROBERT S. MARX,
HARRY KASFIR,
VINCENT C. VELDORALE,
JOHN GARAGUSO,
JOSEPH MARINELLI,
Attorneys for A. M. Anderson, Receiver of the National Bank of Kentucky.

ORDER AMENDING OPINION AS FILED AUGUST 3, 1945.

(Filed Aug. 3, 1945.)

AND NOW, to wit, this 15th day of November, 1945, the opinion in the above entitled cause filed August 3, 1945, is amended as follows:

By inserting the words "brought in Kentucky" between the words "suit" and "to" on the 12th line of page 8;

By inserting after the period following the word "place" in the 11th line of page 10 the following sentence, "Since the cause of action has been fully barred by the limitation laws of Kentucky, the state in which it arose, the Pennsylvania 'borrowing' statute makes the Kentucky statute of limitations operative as the applicable limitation law of the forum";

By striking the words "Under the Pennsylvania Act of June 26, 1895, the law of the forum", beginning on the 12th line of page 10, and inserting in lieu thereof the words "The Pennsylvania Act of June 26, 1895 borrows the Kentucky limitation statute which becomes the limitation law of the forum for the purposes of this case, and".

(Sgd.) GUY K. BARD,
Judge.

[fol. 57a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Plaintiff-Appellant,

vs.

MRS. JULIA DUPONT ANDREWS, et al., FIDELITY-PHILA. TRUST Co., Trustee, etc., et al., Girard Trust Co., Trustee, etc., et al.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

ORDER ASSIGNING HON. HARRY E. KALODNER FOR ARGUMENT—Filed May 24, 1946

And now, to-wit: this 24th day of May, A. D. 1946, it is ordered that Hon. Harry E. Kalodner, District Judge for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

[fol. 58a] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Appellant,

v.

MRS. JULIA DU PONT ANDREWS; MRS. HAZEL BERGER; Katherine N. Bradford; William Bradford; Mrs. Nellie Sanders Brooks; James Glen Childers; Mrs. Elizabeth S. Cope; Francis R. Cope, Jr.; Fidelity-Philadelphia Trust Company, Substitute Trustee for Charles N. Davis, under the Will of Charles W. Poultney, Dec'd.; Charles N. Davis; Girard Trust Company, Trustee u/d Jane Gray Glen Childers; Jane Gray Glen Childers;

Girard Trust Company, Trustee Clementine Cope and Annette Cope Memorial Fund; Girard Trust Company, Trustee u/d James Lyle Glenn; James Lyle Glenn; Gottlieb Grauf; Joseph F. Gunster; James D. Harlan; Catherine B. Heyer; Harriet Heyer, Executrix of the Estate of Edward G. Heyer, Dec'd.; Harriet Heyer, Distributee of the Estate of Edward G. Heyer, Dec'd.; Mrs. Harriet Heyer; Miss Grace A. Hillenmeyer; Leicester B. Holland; Mrs. Louise Adams Holland; Rupert S. Holland; Newton Linville; R. Courtenay Loving; Carolina S. McCowan; Stewart Morgan; Miss Blanche E. Neide; Jesse Pilson; Mrs. Elsa Neide Brooke Pridgen; Mrs. Lucy S. Putnam; Charles Roland; Elizabeth C. Rolph; Mrs. Mary E. Seaman; Fidelity-Philadelphia Trust Company, Agent for Mrs. Rebecca B. Willing Spencer; Mrs. Rebecca B. Willing Spencer; Joseph J. Tunney; Robert D. Christie, Executor of the Estate of Pauline W. Christie, Dec'd.; Robert D. Christie, Distributee of the Estate of Pauline W. Christie, Dec'd.; Mary Christie Weyer, Distributee of the Estate of Pauline W. Christie, Dec'd.; John W. Christie, Distributee of the Estate of Pauline W. Christie, Dec'd.; Jonathan M. Steere, Gilbert L. Bishop, Jr., E. B Morris, Jr., George H. Stuart, III, and Thomas S. Hopkins, Partners, Trading and Doing Business under the Firm Name and Style of Steere & Company, Martha R. Blessing; A. Irvin Voss; Lena Schmidte; Fidelity-Philadelphia Trust Company, Trustee u/w Blanche E. Neide, Deceased

[fol. 59a] Appeal from the Judgment and Order of the United States District Court for the Eastern District of Pennsylvania

Argued May 24, 1946

Before Goodrich and McLaughlin, Circuit Judges and Kalodner, District Judge

Opinion of the Court—Filed August 13, 1946

By Goodrich, Circuit Judge:

This is a suit by the receiver of a defunct national bank to recover against shareholders their liability upon

an assessment.[1] The suit was brought against the shareholders in the federal court for the Eastern District of Pennsylvania. It was begun more than five years and less than six years after the cause of action had accrued.[2] [fol. 60a] These dates present the significant facts for the application of a rule of law to the one disputed question on this appeal. There is no federal statute of limitations limiting the time in which shareholders' liability in a national bank may be enforced. The local law of limitations,

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[1] This suit by the receiver of a defunct national bank, which was located in Kentucky, was instituted against the shareholders of a Delaware bank-stock company (Banco Kentucky Company). Stock of the national bank had been held by trustees. The trustees had issued trust participation certificates in exchange for the national bank stock. The trust participation certificates were exchanged later for stock of the Banco Kentucky Company. The receiver of the national bank had obtained a $4,000,000 judgment against Banco Kentucky Company because of a double liability assessment upon the national bank shares. Laurent v. Anderson, 70 F. (2d) 819 (C. C. A. 6, 1934). Some $90,000 was paid upon the judgment by the Banco Kentucky Company. The receiver then instituted personal suits against numerous shareholders of Banco to recover the balance of the $4,000,000 judgment. Anderson v. Abbott, 321 U. S. 349 (1944), presented a thorough analysis of the corporate relations and established the individual liability of the shareholders of Banco for the assessment upon the national bank stock. We discuss the problem of the instant case, therefore, as though the defendants had been individual shareholders from the outset.

[2] The National Bank of Kentucky failed on November 16, 1930. The United States Comptroller of Currency levied an assessment of $4,000,000 upon the shareholders on February 20, 1931. April 1, 1931 was set by the Comptroller as the final date for payment of the assessment. Rawlings v. Ray, 312 U. S. 96 (1941) decided that the statute of limitations is to run from the date set for payment of the assessment, here April 1, 1931. February 18, 1937 was the date of filing of the instant suit.

therefore, is applicable.[3] The applicable statute of limitations in Pennsylvania is six years.[4] But Pennsylvania, along with the majority of other states, has a "borrowing" statute.[5] The borrowing provision reads as follows:

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[3] When there is no federal statute of limitations and litigation occurs in a federal court the following situations may arise:

a. If the litigation is a law suit the state statute of limitations of the state where the cause of action arose will govern. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390 (1906); Campbell v. Haverhill, 15 U. S. 610 (1895).

b. If the litigation is solely in equity the federal courts may adopt similar state equity limitations. Benedict v. City of New York, 250 U. S. 321 (1919). The federal courts are not bound, however, to adopt state criteria and apply them by analogy. Russell v. Todd, 309 U. S. 280, 288, n. 1 (1940).

c. If litigation is solely in equity and the state wherein the cause of action arose has no analogous equitable action the federal courts will use the doctrine of laches. Speidel v. Henrici, 120 U. S. 377 (1887); Wagner v. Baird, 7 How. 234 (1849).

d. If the litigation in equity is to aid a legal right equity will withhold its remedy if the legal right is barred by a local statute of limitation. Russell v. Todd, 309 U. S. 280, 289 (1940); McDonald v. Thompson, 184 U. S. 71 (1902); Wilson v. Koontz, 7 Cranch 202 (1812).

e. If the litigation involves facts where there is concurrent equity jurisdiction the statute of limitations that bars the legal right also bars recovery in a suit in equity. Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Overfield et al. v. Pennroad Corporation, 146 F. (2d) 889 (C. C. A. 3, 1944).

[4] ". . . all actions of debt, . . . which shall be sued or brought . . . shall be commenced and sued . . . within six years next after the cause of such actions or suit, and not after. . . ." Act of March 27, 1713, 1 Sm. L. 96, § 1; 12 P. S. Sec. 31.

[5] See the discussion: Legislation Governing the Applicability of Foreign Statutes of Limitation (1935), 35 Col. L. Rev. 762.

"When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth."[6]

This moves us to the question in the case. The Kentucky period of limitations applicable to such an action as [fol. 61a] this is five years.[7] The national bank, whose shareholders are now being sued, had its principal banking office in the City of Louisville, Kentucky.[8] The defendants say that the Pennsylvania borrowing statute protects them from suit in a federal court in Pennsylvania. The theory of the defense is that this cause of action arose in Kentucky. By the statute of limitations of Kentucky the action was brought too late, it having been commenced, as already stated, more than five years after the liability accrued. The terms of the Pennsylvania borrowing statute, therefore, they say, became applicable and the suit is brought too late here.[9]

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[6] Act of June 26, 1895, P. L. 375, § 1; 12 P. S. Sec. 39.

[7] "An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." General Statutes, Chap. 71, Art. III, Sec. 2; Kentucky Revised Statutes, Baldwin's 1930 Revision, Chap. 80, Sec. 2515. This was subsequently changed in form to read: "Actions to be brought within five years. The following action shall be commenced with five years after the cause of action accrued:

(1) An action upon a contract not in writing, expressed or implied.

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability. * * *" Kentucky Revised Statutes, Sec. 413.120 (2nd Ed., 1944).

[8] It had ceased to do business at the time the assessment upon shareholders was made.

[9] Note that the Pennsylvania borrowing statute provides a defense to an action "brought in any of the courts of this Commonwealth." It could be urged, perhaps, that the borrowing statute is, by its terms, not applicable because the

The theory upon which the defendants urge that this action arose in Kentucky is something like this. The liability of the shareholders to pay an assessment upon stock is contractual in its nature. This contract was performable at the office of the Receiver at his stated address in the City of Louisville, Kentucky, because that is really where the Receiver's notice to shareholders indicated that payments should be made. The cause of action for breach of contract arises under the law of the place where the promisor had a duty to perform and failed to perform. Since [fol. 62a] that place was the specified office building in Louisville, the cause of action arose there just as the cause of action in tort would arise under the law of the place of wrong. There are authorities which, applying these borrowing statutes, follow the rules suggested as to the place of claim for breach of contract and tort.[10]

This argument is all right if it is said quickly without parsing it. But we do not think that it is accurate as a matter of legal analysis to say that a shareholder's liability on his stock is contractual.[11] The unfortunate shareholder does not promise to pay a shareholder's liability equal to the par value of his stock if the bank fails. The obligation is imposed on him by law. Perhaps it can be called "quasi contractual" if that helps to distinguish it from liability based upon intentional or negligent misconduct. But this fact does not make a suit to enforce the shareholder's lia-

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United States District Court is not a court of the Commonwealth of Pennsylvania. We make nothing of this point, however, because we think the case ought to be settled on the broader ground than verbal hair-splitting.

[10] Cases involving breach of contract: Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F. (2d) 822 (C. C. A. 6, 1930), cert. den. 281 U. S. 730 (1930); Pond Creek Mill & Elevator Co. v. Clark, 270 Fed. 482 (C. C. A. 7, 1920). Case involving a tort: Baltimore & Ohio RR. Co. v. Reed, 223 Fed. 689 (C. C. A. 6, 1915), cert. den. 239 U. S. 640 (1915). Notes (1931) 75 A. L. R. 211; Restatement, Conflict of Laws (1934) § 604, comment b; 11 Am. Jur., Conflict of Laws, § 197; Goodrich, Conflict of Laws (2d ed. 1938) 202.

[11] McClaine v. Rankin, 197 U. S. 154, 161 (1905) McDonald v. Thompson, 184 U. S. 71, 73, 74 (1902).

bility the enforcement of a promise made by the shareholder. Nor are we satisfied that when the Receiver named his office as the place where checks could be sent to pay this assessment that this made the office the "place of performance." The recipient of the payment was really not the Receiver but the Comptroller General of the United States who, obviously, is not located in Kentucky.[12] Even on defendants own theory, therefore, we find it hard to see that [fol. 63a] the facts of their case fit the legal rule on which they base immunity.

There is a wider ground, however, on which we think the defendants are wrong and which compels a reversal of the judgment of the District Court. The approach, we think, is found in the language of Mr. Justice Frankfurter speaking for the Court in Holmberg, et al. v. Armbrecht, et al., U. S. , decided February 25, 1946. In the case which involved liability of shareholders in the Southern Minnesota Joint Stock Land Bank he said: "We do not have the duty of a federal court, sitting as it were as a court of State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress." In our case the liability imposed upon the shareholders of national banks for the benefits of their creditors is not a state created right, but one created by United States statute. The liability extends to all shareholders regardless of the state where the bank has its principal place of business and regardless of where shareholders live. In dealing with it the rules applicable are not those in which a federal court, sitting in a diversity case,

[12] Whenever the Comptroller becomes satisfied of the insolvency of a national bank he has the statutory power to appoint a receiver. 19 Stat. 63 (1876), 12 U. S. C. A. § 191. The receiver is the representative of the Comptroller. United States v. Weitzel, 246 U. S. 533, 541 (1918); Lehman v. Spurway, 58 F. (2d) 227, 228 (C. C. A. 5, 1932). The receiver is under the direction of the Comptroller and may enforce individual liability and is charged with the duty to pay all money over to the Treasurer of the United States, subject to the order of the Comptroller. 13 Stat. 114 (1864), 12 U. S. C. A. §192.

applies state law as accurately as it can. It is, rather, one of those instances where federal courts are enforcing rights arising out of transactions governed by the federal government acting within its constitutional field. Ordinary state rules of law are not applicable to create or to limit the claim.[13] We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the [fol. 64a] United States.[14] We conclude, therefore, that the borrowing provision of the Pennsylvania statute of limitations is not applicable. It is not disputed that the action is timely brought unless the borrowing statute may be availed of to bar it. The conclusion necessarily follows, therefore, that it may be maintained, so far as the time element is concerned and this is the only point up for our decision at this time.

In reaching this conclusion we are quote conscious that we are in disagreement with our brethren of the Sixth Circuit in the decision they reached in Helmers, et al. v. A. M. Anderson, F. (2d) (C. C. A. 6, 1946), a case decided since the submission of the one at bar. We have read the carefully prepared opinion in that case, but are still constrained to follow the view of the matter which we have expressed above.

The judgment of the District Court is reversed and the case remanded for further proceedings in conformity with this opinion.

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[13] Cf. Herget, Trustee in Bankruptcy v. Central National Bank & Trust Co., 324 U. S. 4, 9 (1945). Accord, D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U. S. 447 (1942) (Note especially Mr. Justice Jackson's concurring opinion at pp. 465-475).

[14] It is, of course, true that statutes passed within constitutional authority by the Congress become a part of "the law" in Kentucky and in other states because the laws of the United States become "the supreme law of the land".

[fols. 65a-67a] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Appellant,

vs.

JULIA DUPONT ANDREWS, et al.

JUDGMENT—Filed August 13, 1946

Present: Goodrich and McLaughlin, Circuit Judges, and Kalodner, District Judge

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause is remanded for further proceedings in conformity with the opinion of this court.

By the Court, Goodrich, Circuit Judge.

August 13, 1946.

[File endorsement omitted]

[fols. 68a-74a] Petition for Rehearing covering 5 pages filed Aug. 27, 1946, omitted from this print. It was Denied, and nothing more by order of Sept. 10, 1946.

[fol. 75a] In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Denying Petition for Rehearing—Filed September 10, 1946

And Now, to wit September 10, 1946, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— ——.

Goodrich, Circuit Judge.

[fol. 76a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 77a] Supreme Court of the United States

Order Allowing Certiorari—Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.